**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 1029 of 2002**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE C.K.BUCH**

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

**VIRABHAI KALABHAI AAYAR - Appellant(s)**
**Versus**
**STATE OF GUJARAT - Opponent(s)**

==========

**Appearance :**
MS NITA C BANKER for Appellant(s) : 1,
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

==========

**CORAM : HONOURABLE MR.JUSTICE C.K.BUCH**

**Date : 14/08/2007**

**ORAL JUDGMENT**

The present appellant is the original accused No.2 who has been charged and tried by the learned Special and Additional Sessions Judge, Banaskantha at Deesa in Special Case No.4 of 2000 on 11th March, 2002

for the offence punishable under Sections 17 read with Section 29 of the Narcotics Drugs and Psychotropic Substance Act and has been sentenced to undergo four years rigorous imprisonment and to pay a fine of Rs.25,000/-, in default of making payment of fine to undergo one year rigorous imprisonment.

2. The order of conviction and sentence has been assailed on various grounds by the learned Advocate for the appellant. The memo of appeal is received through Jail Authorities. When this appeal was listed for hearing on 7th August, 2007, Ms.Banker has taken me through the entire allegation made by the prosecution against the appellant and also through the relevant part of the evidence led. According to her, as such there was no case against the appellant but the learned trial Judge has surprisingly held the appellant guilty of the charge of offence as aforesaid. A plain reading of the complaint or charge does not reveal any fact under which the appellant even could have been prosecuted. The Panchas have not supported the case of prosecution and mandatory statutory requirement were

not followed by the Raiding Officer. The prosecution is under obligation to prove the conscious possession of the substance prohibited under the scheme of N.D.P.S. Act beyond reasonable doubt and for that following the scheme of N.D.P.S. vis-a-vis the other relevant Code of the Criminal Procedure and the Evidence Act, the prosecution should provide evidence which can be said to be cogent and convincing in nature to link the accused with the crime. But, here no such evidence is placed before the Court even then the accused has been held guilty. The finding therefore arrived at by the learned trial Judge should be held to be perverse, based on incorrect appreciation of evidence. On that day the Court was inclined to peruse the original records and proceedings, but the Court time was about to over so the matter was ordered to be listed today. Today I have heard Ms.Pandit, who has responded the submission of Ms.Banker.

3. To appreciate the rival side submission firstly it would be beneficial to state the case of prosecution in brief which is reflected in F.I.R.

(Exh.40) tendered in form of evidence by Prosecution Witness No.11, Police Sub Inspector, Mr.N.K.Parmar, who is the complainant and has tried to prove the basic allegations made against the accused persons. As per say of P.W.No.11, Mr.Parmar, P.S.I. alongwith some Police Officials including Mr.Gordhanbhai, A.S.I. and Mr.Shersinh was on petrolling on 17th November, 1999 from 13:30 hours and when they were proceeding from Village Soni to Village Nesda, he had seen two persons and found their movement suspicious. Both of them looked frightened on seeing the Police Jeep Car, and therefore accused were interrogated and they were not able to give satisfactory reply. So because of suspicious, the complainant had called the two persons to remain as Panch Witness and both the suspicious persons were searched. Thereafter, Mr.Parmar, P.I. found opium from the pocket of loose shirt popularly known as “Zabhbha” worn by the original accused No.1, who was resident of village Chania, Tal. Radhanpur. It is the say of prosecution that at that time the present appellant was with Sureshbhai. Both of them were asked that whether they wanted to search them in presence of the

Executive Magistrate and both of them replied in affirmative so both the accused persons were taken in the Police Jeep Car alongwith the Panchas. They came to the Police Station from village Soni. The Jeep Car was parked in the open compound and the Executive Magistrate, Deodar was informed. Thereafter, in presence of the Executive Magistrate both the accused persons were searched in presence of the same Panchas and muddamal opium was found in the pocket of Zabhbha worn by accused No.1. It is alleged that accused No.1 had tendered that opium and same was weighing with the help of one goldsmith – Maheshbhai Bhogilal of Deodar, which was 210 grams. Out of which 25 grams were separated and taken as sample, other 25 grams was kept as control sample whereas rest of the opium, that is, 160 grams opium was kept in another plastic packet. All the samples were sealed in presence of the Panchas and the slip signed by the Panchas were affixed on the three samples.

4. The charged framed at Exh.6 states that on 17th November, 1999 at about 16:50 hours, the muddamal

opium was found from the pocket of Zabhbha of accused No.1 and thereby accused No.1 has committed offence punishable under Section 17 and as the accused No.2 was with accused No.1 when accused No.1 was found with the prohibited substance opium the accused No.2 has committed offence punishable under Section 17 read with Section 29 of the N.D.P.S. Act. The backbone of the argument of Ms.Banker is that for the sake of argument if it is accepted that the accused No.2, that is, present appellant was with accused No.1, he could not have been linked with the offence punishable under Section 17 of the Act because the prosecution has to plead any overact which can be said to be an act of abetment or make him a person in conspiracy to commit the offence punishable under a given chapter, i.e., Chapter No.IV of the N.D.P.S. Act. No allegation of such conspiracy has been made against accused No.2 from the beginning. Considering the conduct the question would be as to how a person accompanying with the other, can be said to be an abettor in absence of any specific evidence.

5. Ms.Pandit, ld. A.P.P. has submitted that the

learned trial Judge has relied on the evidence of Police Witnesses because if the present appellant was innocent then his behaviour would not have become abnormal on seeing the Police Jeep Car. The Police had no reason to doubt an honest pedestrian. It is very likely that accused No.1 may be carrying the entire muddamal and as the present appellant was conscious about that fact, he was not able to reply the questions that were asked by Mr.Parmar, Police Inspector. But in response of the query raised by the Court, Ms.Pandit, has fairly accepted that evidence in this regard led by prosecution is hazy in nature and recovery of muddamal in presence of the Executive Magistrate appears to be arranged thing. The Panchas have not supported the case of prosecution. There was nothing on record to show any relation or even very good friendship between the two accused. When the Police had searched accused No.1 near village Soni, and it is not the say of Mr.Parmar, Police Inspector that present appellant was found in possession of any prohibited substance like accused No.1 or even the sell proceeding, he could not have been taken to the Executive Magistrate and there was

no need to make a re-search of accused No.2,i.e., present appellant.

6. This Court has taken through the evidence of both the Panch Witnesses examined at Exh.10-Ambabhai Rupabhai and Exh.14-Rameshbhai Chhaganbhai. They were present in the sim of village Soni where both of them allegedly taken by Police Party to Deodar. Panch-Ramesh is the driver. He has stated that when he was going in the evening with his car, he was stopped by one Police personnel and his signature was obtained. In the same way the Panch – Amba Rupa has also not stated that he was present at odd hours on 14:30 between village Soni and Nesda. He is an agriculturist. After declaring this witness hostile, even there is no suggestion put to this witness through which this Court can infer that his presence between two Village Soni and Nesda is probable. Of course, the Executive Magistrate is examined. But the crucial question is that at the time of drawing the first part of the Panchnama, the Executive Magistrate was not there. The Panchnama (Exh.42) is in two parts. If it was drawn in presence of the

Executive Magistrate then it was easily inferable that no Panchnama was drawn at the time when the accused persons were searched / inspected for the first time and Mr.Parmar, P.I. in the presence of the member of petrolling team had seen the muddamal opium in the pocket of Zabhbha of accused No.1. The F.I.R. shows that all of them had come to one open parcel of land described as open ground and jeep was parked there and thereafter the Executive Magistrate was informed. So the recovery of muddamal in presence of the Executive Magistrate appears to be a drama and this Panchnama could not have been considered as a reliable piece of evidence at all. The evidence of Executive Magistrate also cannot be said to be any helpful to the prosecution. Yadi (Exh.41) allegedly sent to the Executive Magistrate, shows that the same was sent by P.S.I., Deodar. This Yadi was received by Executive Magistrate at 15:30 hours and the seizure memo (Exh.48) shows that the muddamal was seized at the Office of the Executive Magistrate and Mamlatdar, Deodar. So the original accused No.1 was found in possession of muddamal opium weighing about 210 grams for the first time between village Soni and

Nesda at about 14:30 hours and the present accused has been held guilty as abettor for alleged seizure of muddamal opium, i.e. some substance that was found by Police Inspector at about 16:15 hours at Deodar itself.

7. If such an order of conviction is upheld then number of persons can be victimized under the charge of alleged abetment or a conspiracy by incorporating bare word that a particular person was in the company of a person or was with the person from whom the prohibited substance is found and recovered. The consciousness of the appellant-accused qua the existence of prohibited substance with original accused No.1 also would not make him an abettor. One can commit foolish mistake of walking in the company of a person who is moving with any prohibited article. The abetment is defined and discussed at length by this Court and the Supreme Court keeping in mind the scheme of Section 107 of the Indian Penal Code. Here, it is not necessary to quote the relevant Section of the Indian Penal Code, but at least the learned trial Judge was under

obligation to discuss in detail all the evidence before branding the present appellant as abettor described in Section 29 of the N.D.P.S. Act read with Section 107 of the Indian Penal Code. The prosecution was under obligation to prove the conscious possession of accused No.1 and also the act or omission equal to abetment by the present appellant qua the conscious possession of the prohibited substance that was found with accused No.1. As the Court is not dealing with the appeal preferred by the accused No.1, it would not be either legal or proper for the Court to comment as to the adequacy of the evidence with regard to the conscious possession of accused No.1 as believed by the learned trial Judge so far as the accused No.1 is concerned. The learned trial Judge has not even applied his mind that how many persons has boarded the jeep car because as per P.S.I. Mr.Parmar he himself alongwith A.S.I. Shri Gordhan and Shersinh, Unarmed Head Constable, Parsottambhai and Saburbhai and other members were on duty since 13:30 hours. There were already about eight persons in the jeep car and the say of the police is that they loaded another four persons, i.e.

two accused persons and two Panchas in the said jeep car. It is not the say of Mr.Parmar, P.I. that he himself was driving the jeep car. For short, it appears that this is a case created and unfortunately believed by the learned trial Judge. If raid was genuinely made, which was allegedly made between Village Soni and Nesda, and the original accused No.1 was found in possession of prohibited substance opium incidentally or accidentally then formal Panchnama could have been drawn at the spot and accused No.2 ought to have been permitted to go. One cannot know a person to whom is accompanying carrying something in his pocket and that substance is a prohibited substance and therefore only in more than one cases this Court and the Apex Court has observed that carrying of an unauthorized arm is an offence committed individual offence and simply carrying of prohibited arm is an offence normally cannot be abetted by the other. An abettor is defined under Section 108 of the Indian Penal Code and unless the act or omission of the accused does not fall in the category of either abetment or that very person does not fall in the category of abettor within the

meaning of Section 108 of the Indian Penal Code, he would not be held guilty because the intention and the presence of *mens rea* is considered to be vital to bring home the charge.

8. So, this is a case of unfair bias prosecution lodged by Mr.Parmar and therefore the present appellant can prosecute Mr.Parmar and claim compensation for all loss and sufferings in the Court of law, if he is otherwise legally entitled to initiate such action for the malicious prosecution that appellant has faced.

9. In such a situation the learned trial Judge could not have linked the accused with the crime, as it was not even possible for the trail Court to link the present appellant with the accused No.1 in absence of any convincing evidence. True it is that Police Witnesses can be relied upon but in a given case such reliance can be placed. This case does not fall in the category where the words uttered by the Police personnel could have been accepted as gospel truth. It is not necessary to mention the number of

other infirmities emerging from the evidence under which the accused could not have been linked with the crime.

10. In the result, the present Criminal Appeal is allowed. The judgment and order of conviction and sentence dated 11th March, 2002, rendered by the learned Special and Additional Sessions Judge, Banaskantha at Deesa in Special Case No.4 of 2002 is hereby quashed and set aside. The appellant is acquitted of the charge of offence punishable under Section 17 read with Section 29 of the N.D.P.S. Act, 1955. The appellant is ordered to be set at liberty, if not, required in any other case. Fine, if paid by the appellant, is ordered to be refunded to him on proper identification. Order and Direction accordingly.

***(C.K.BUCH, J.)***

sompura